

§ 22.215

(2) Related to weapons systems and other military needs or of potential interest to the DoD Component.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

§ 22.215 Distinguishing grants and cooperative agreements.

(a) Once a grants officer judges, in accordance with §§ 22.205 and 22.210, that either a grant or cooperative agreement is the appropriate instrument, the grants officer shall distinguish between the two instruments as follows:

(1) Grants shall be used when the grants officer judges that substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated in the agreement.

(2) Cooperative agreements shall be used when the grants officer judges that substantial involvement is expected. The grants officer should document the nature of the substantial involvement that led to selection of a cooperative agreement. Under no circumstances are cooperative agreements to be used solely to obtain the stricter controls typical of a contract.

(b) In judging whether substantial involvement is expected, grants officers should recognize that “substantial involvement” is a relative, rather than an absolute, concept, and that it is primarily based on programmatic factors, rather than requirements for grant or cooperative agreement award or administration. For example, substantial involvement may include collaboration, participation, or intervention in the program or activity to be performed under the award.

§ 22.220 Exemptions.

Under 31 U.S.C. 6307, “the Director of the Office of Management and Budget may exempt an agency transaction or program” from the requirements of 31 U.S.C. chapter 63. Grants officers shall request such exemptions only in exceptional circumstances. Each request shall specify for which individual transaction or program the exemption is sought; the reasons for requesting an exemption; the anticipated consequences if the exemption is not granted; and the implications for other

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agency transactions and programs if the exemption is granted. The procedures for requesting exemptions shall be:

(a) In cases where 31 U.S.C. chapter 63 would require use of a contract and an exemption from that requirement is desired:

(1) The grants officer shall submit a request for exemption, through appropriate channels established by his or her DoD Component (see 32 CFR 21.320(a)), to the Director of Defense Procurement and Acquisition Policy (DDP&AP).

(2) The DDP&AP, after coordination with the Director of Defense Research and Engineering (DDR&E), shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

(b) In other cases, the DoD Component shall submit a request for the exemption through appropriate channels to the DDR&E. The DDR&E shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

(c) Where an exemption is granted, documentation of the approval shall be maintained in the award file.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 70 FR 49464, Aug. 23, 2005]

Subpart C—Competition

§ 22.300 Purpose.

This subpart establishes DoD policy and implements statutes related to the use of competitive procedures in the award of grants and cooperative agreements.

§ 22.305 General policy and requirement for competition.

(a) It is DoD policy to maximize use of competition in the award of grants and cooperative agreements. This also conforms with:

(1) 31 U.S.C. 6301(3), which encourages the use of competition in awarding all grants and cooperative agreements.

(2) 10 U.S.C. 2374(a), which sets out Congressional policy that any new grant for research, development, test, or evaluation be awarded through merit-based selection procedures.

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(b) Grants officers shall use merit-based, competitive procedures (as defined by § 22.315) to award grants and cooperative agreements:

(1) In every case where required by statute (e.g., 10 U.S.C. 2361, as implemented in § 22.310, for certain grants to institutions of higher education).

(2) To the maximum extent practicable in all cases where not required by statute.

§ 22.310 Statutes concerning certain research, development, and facilities construction grants.

(a) *Definitions specific to this section.* For the purposes of implementing the requirements of 10 U.S.C. 2374 in this section, the following terms are defined:

(1) *Follow-on grant.* A grant that provides for continuation of research and development performed by a recipient under a preceding grant. Note that follow-on grants are distinct from incremental funding actions during the period of execution of a multi-year award.

(2) *New grant.* A grant that is not a follow-on grant.

(b) *Statutory requirement to use competitive procedures.* (1) A grants officer shall not award a grant by other than merit-based, competitive procedures (as defined by § 22.315) to an institution of higher education for the performance of research and development or for the construction of research or other facilities, unless:

(i) In the case of a new grant for research and development, there is a statute meeting the criteria in paragraph (c)(1) of this section;

(ii) In the case of a follow-on grant for research and development, or of a grant for the construction of research or other facilities, there is a statute meeting the criteria in paragraph (c)(2) of this section; and

(iii) The Secretary of Defense submits to Congress a written notice of intent to make the grant. The grant may not be awarded until 180 calendar days have elapsed after the date on which Congress received the notice of intent. Contracting activities must submit a draft notice of intent with supporting documentation through channels to

the Deputy Director, Defense Research and Engineering.

(2) Because subsequently enacted statutes may, by their terms, impose different requirements than set out in paragraph (b)(1) of this section, grants officers shall consult legal counsel on a case-by-case basis, when grants for the performance of research and development or for the construction of research or other facilities are to be awarded to institutions of higher education by other than merit-based competitive procedures.

(c) *Subsequent statutes.* In accordance with 10 U.S.C. 2361 and 10 U.S.C. 2374, a provision of law may not be construed as requiring the award of a grant through other than the merit-based, competitive procedures described in § 22.315, unless:

(1) *Institutions of higher education—new grants for research and development.* In the case of a new grant for research and development to an institution of higher education, such provision of law specifically:

(i) Identifies the particular institution of higher education involved;

(ii) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361 (a requirement that applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989); and

(iii) States that the award to the institution of higher education involved is required by such provision of law to be made in contravention of the policy set forth in 10 U.S.C. 2374(a).

(2) *Institutions of higher education—follow-on grants for research and development and grants for the construction of any research or other facility.* In the case of any such grant to an institution of higher education, such provision of law specifically:

(i) Identifies the particular institution of higher education involved; and

(ii) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361 (a requirement that applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989).

(3) *Other entities—new grants for research and development—(i) General.* In